FILED
JUN 24 1993
OFFICE OF THE CLERK

NO. 92-1743

In the Supreme Court of the United States

OCTOBER TERM, 1993

GARY M. BOUGERE,

Petitioner,

V.

CARLO F. FERRARA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether this Honorable Court should deny petitioner's request to apply federal jurisprudence interpreting 42 U.S.C § 1983 to a state-law tort action of defamation and thereby affirm its opinion in Paul v. Davis, 424 U.S. 693, 92 S.Ct. 1155, 47 L.Ed.2d 405 (1976), re. denied 425 U.S. 985, 96 S.Ct. 2194, ____ L.Ed.2d ____ (1976), holding that a state-law tort claim of defamation alone does not establish a federal claim pursuant to 42 U.S.C. §1983.

List of Parties

The petitioner and the plaintiff below is Gary M. Bougere. Susan M. Dugas was also a plaintiff in the District Court.

The respondent is Carlo F. Ferrara. The City of Harahan, Louisiana, was also a defendant in the District Court.

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COUNTER STATEMENT OF THE CASE

Carlo Ferrara was an executive official acting within the course and scope of his official duties and was accordingly absolutely privileged to answer the questionnaire and respond to the interview of the Florida Board of Bar Examiners because Mayor Ferrara was the Chief Executive Officer of the City of Harahan, one of Gary Bougere's former employers. (Tr. 13, 93, 129-130, 136-138, 148; R. 270, 620).

On January 1, 1987, Bougere was sworn into office as mayor of the City of Harahan, Louisiana. (R. 617). Within one year of his assuming office, a group known as the "Citizens for a Better Harahan" successfully obtained the requisite number of signatures for a

recall election.[1] (R. 620). Petitioner chose not to face the embarrassing prospect of being forcibly ejected from office and chose to resign under extreme controversy upon certification of the recall petition. Id. Petitioner and his wife subsequently moved to Florida. (R. 619).

On or about January 5, 1989, plaintiff applied to the Florida Board of Bar Examiners (hereinafter referred to as the "FBBE"), an official arm of the Florida Supreme Court, for admission to the Florida Bar; as a condition of admission, Bougere executed an

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[1]Bougere states in his petition that numerous statements were made against him which were considered defamatory during the recall petition effort. (Petition 2). However, Bougere fails to cite to the record. The record is devoid of any references to any statements made by anyone which could be considered defamatory during the recall.

"Authorization and Release" form. (R. 992, 617-622). The "Authorization and Release" authorized the FBBE to investigate plaintiff's moral character and authorized individuals to respond to questions of the Board without fear of any type of legal liability.[2] (R. 945).

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[2]The Authorization and Release form contains the following provision:

> "I hereby release and exonerate every medical doctor, school official, and every other person, firm, officer, corporation, association, organization or institution which shall comply in good faith with the authorization and request made herein from any and all liability of every nature and kind growing out of or in anywise pertaining to the furnishing or inspection of such documents, records and other information or the investigation made by said Florida Board of Bar Examiners. The undersigned further waives absolutely any privilege he may have relevant to his good moral character and fitness to perform the responsibilities of an attorney under Section 90.503 Florida

In a letter dated January 10, 1989, the FBBE contacted the City of Harahan, as a past employer of Bougere, seeking information concerning plaintiff's moral character and fitness.[3] (R. 620-21).

The questionnaire sought to elicit the opinions of Mayor Carlo R. Ferrara

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Statutes."

[3]The FBBE's questionnaire contained the following language:

> The applicant has authorized all sources having information relative to the character and fitness of the applicant to cooperate with the Board by making that information available to the Board and has released and exonerated all sources from any and all liability of every nature and kind pertaining to the furnishing of information to the Board.

(Defendant's Exhibit 7).

regarding the plaintiff's moral character and fitness. Id. In his City Hall office, Ferrara complied with the FBBE's request and checked the relevant boxes, drafted a letter on City of Harahan stationary discussing his contacts with and opinions of Bougere, and signed the questionnaire as Mayor of the City of Harahan. (Tr. 129-31, 136-41).

On January 19, 1989, Ferrara returned both documents by mail to the FBBE. (R. 621). Ferrara further discussed his contacts with and opinions of Bougere on May 24, 1989, when the FBBE sent an investigation to Louisiana to interview Ferrara. (Defendants' Exhibit 8; Tr. 76-77).[4]

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[4]In the pretrial order, the following were undisputed facts 1) the FBBE's questionnaire was addressed to Mayor Ferrara, City of Harahan, 2) Mayor Ferrara filled out the questionnaire at Harahan City Hall, 3) signed the questionnaire as

Bougere, and his wife, Dugas, filed the instant action on January 12, 1990, in the United States District Court for the Eastern District of Louisiana, alleging Ferrara's response to the FBBE's correspondence and statements to the investigator were defamatory, resulting in various damages. (R. 208-213). Jurisdiction of this state-law tort action of defamation was based upon diversity of citizenship. Id.

SUMMARY OF THE ARGUMENT

Petitioner's reliance on the Hafer v. Melo, Stepanian v. Addis, and Marrero v. City of Hialeah decisions is

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Mayor, 4) an FBBE investigator interviewed Mayor Ferrara at Harahan City Hall, and 5) Mayor Ferrara provided information to the FBBE based on Bougere's employment history with the City of Harahan. (R. 617-622; Defendant's Exhibit 6, 7, 8, 12; Tr. 76-77, 136-40, 148-49).

misplaced.

First, the Hafer decision is inapplicable because the plaintiff's claim in that case was based on a 42 United States Code § 1983 claim. However, the present case deals with a solely state tort claim of defamation. In a diversity suit, the court must look to state substantive law. The district court determined that the substantive law of the State of Florida applies in the instant case. Thus, petitioner's reliance on the Hafer decision is misplaced.

Second, the Stepanian decision is inapplicable because it dealt with a federal prosecutor bound by federal regulations and afforded federal immunity. In Stepanian, the court stated that whether a federal prosecutor is authorized by federal regulation to make

particular statements is an issue of fact. However, the instant case involves a city official bound by state tort law and afforded no immunity under that law. Thus, the petitioner's reliance on Stepanian is erroneous.

Last, the Marrero decision is inapplicable because it dealt with a claim under 42 U.S.C. § 1983. The present case concerns a defamation claim under state tort law. Thus, the petitioner's reliance on the Marrero decision is mistaken.

Therefore, the petitioner's petition for a writ of certiorari to this Honorable Court should be denied because his reliance on the Hafer, Stepanian, and Marrero decisions is erroneous.

ARGUMENT

Bougere's sole basis for requesting this writ of certiorari is his assertion that the Fifth Circuit's decision is contrary to, and ignores, this Honorable Court's holding and the decisions of the Fifth Circuit and former Fifth Circuit in analogous federal cases involving 42 U.S.C. § 1983 claims. (Petition pp. 7-8).

A. Absolute Immunity[5]

Bougere suggests that the Fifth Circuit's determinations, that Ferrara's publications were made within the course

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[5]Bougere separates this petition into four separate areas: A) Absolute Immunity, B) Scope of Duty, C) Jury Verdict Supported By Substantial Evidence, and D) Protection of Public Good Does Not Require Absolute Immunity. For ease of presentation, Ferrara will address areas C) Jury Verdict Supported By Substantial Evidence, and D) Protection of Public Good Does Not Require Absolute Immunity as one area of discussion.

and scope of his authority and were absolutely privileged, fail to acknowledge this Honorable Court's holding in the "analogous" 42 U.S.C. § 1983 case of Hafer v. Melo, 112 S.Ct. 358 (1991), and "analogous" 42 U.S.C. § 1983 decisions of the Fifth Circuit and former Fifth Circuit in Stepanian v. Addis, 699 F.2d 1046 (11th Cir. 1983) and Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied, 450 U.S. 913. (Petition pp. 7-8). Specifically, he claims that these cases establish that: 1) there is no absolute immunity for state officials, and 2) the scope of duty of an elected official is a question of fact. However, Bougere's reliance upon "analogous" 42 U.S.C. § 1983 cases to resolve a state-law tort claim of defamation is misplaced.

The instant case involves a state-

law tort claim of defamation with federal jurisdiction based upon diversity of citizenship. (R. 208-213). This is not a claim based upon 42 U.S.C § 1983. Id. It is hornbook law that federal courts deciding a diversity case must apply state substantive law. See, Erie v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938) and its progeny. Additionally, in Paul v. Davis, 424 U.S. 693, 92 S.Ct. 1155, 47 L.Ed.2d 405 (1976), re. denied 425 U.S. 985, 96 S.Ct. 2194, ____ L.Ed.2d ____ (1976), this Honorable Court held that a state-law tort claim of defamation alone does not establish a federal claim pursuant to 42 U.S.C. § 1983. State-law tort actions of defamation are separate and distinct from the federal §1983 causes of action. Id. As such, these "analogous" § 1983 cases do not apply to Bougere's state-law tort

action of defamation. Id. Thus, the Fifth Circuit properly applied Florida substantive law and held that Ferrara's statements were absolutely privileged.

Nonetheless, Bougere erroneously requests that this Honorable Court apply the "analogous" federal 42 U.S.C. § 1983 cases of Hafer v. Melo, 112 S.Ct. 358 (1191), Stepanian v. Addis, 699 F.2d 1046 (11th Cir. 1983) and Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied, 450 U.S. 913 to this state-law tort claim of defamation. A simple and brief review of the Hafer decision will establish its limited applicability to 42 U.S.C. § 1983 claims.

In Hafer, this Honorable Court held that "state officials, sued in their individual capacities, **are persons within the meaning of § 1983.**" Hafer, 112 S.Ct. at 365; (Emphasis added). However, the

United States Fifth, Sixth, Fourth, and Second Circuit Courts of Appeals have held that Hafer is limited to § 1983 causes of action. Sanders v. English, 950 F.2d 1152, 1159 (5th Cir. 1992); Hardin v. Straub, 954 F.2d 1193, 1199 (6th Cir. 1992); Mitchell v. Rice, 954 F.2d 187, 190 (4th Cir. 1992); Spear v. Town of West Hartford, 954 F.2d 63, 65-67 (2nd Cir. 1992).

Yet, Bougere erroneously cites Hafer for the proposition that governmental officials acting within their official capacity cannot be absolutely privileged from a lawsuit pursuant to a defamation claim under Florida state law. (Petition 8). This is an incorrect reading of the Hafer decision. The proper reading of Hafer is that a state governmental official is not immune from a § 1983 cause of action by pleading immunity

under color of state law. Id. Additionally, Hafer does not preclude states from recognizing an absolute privilege from state tort claims, such as defamation. Bougere's claim arises not under §1983, but under Florida state tort law. Consequently, the instant case is clearly distinguishable from Hafer because it involves the state-law tort claim of defamation not preempted by federal law. Therefore, Bougere's reliance upon Hafer is in error because Hafer is not applicable.

B. Scope of Duty

Bougere erroneously relies on Stepanian v. Addis, 699 F.2d 1046 (11th Cir. 1983), for the proposition that any privilege enjoyed by Mayor Ferrara would involve considerations of his scope of duty, which is a question of fact, and as such, is properly determined by the jury.

(Petition 8-9). Bougere's reliance on this case is misplaced.

While Stepanian was a diversity case, it involved a federal prosecutor, an assistant United States Attorney, governed by federal regulations on the issue of federal immunity. Stepanian, 699 F.2d at 1047-48. The Eleventh Circuit Court of Appeals held that whether the federal prosecutor was authorized by federal regulation to make particular statements was an issue of fact. Id. at 1049. The instant case involves neither a federal prosecutor nor federal regulation. Consequently, Stepanian is factually and substantively inapplicable.

Additionally, it is hornbook law that federal Courts deciding a diversity case must apply state substantive law. See, Erie v. Tompkins, 304 U.S. 64, 58

S.Ct. 817, 82 L.Ed. 1188 (1938) and its progeny. In determining the law of the state to be applied, the federal courts must look to the law applied by the state courts of the state in which the federal court is located. Klaxon Co. v. Stentor Elect. Mfg. Co., Inc., 61 S.Ct. 1020 (1941). Accordingly, the district court in the instant case applied Jagers v. Royal Indemnity Co., 276 So.2d 323 (La. 1973) and ruled that Florida law was applicable. (R. 82-84).

C. Jury Verdict Supported by Substantial Evidence and Protection of Public Good Not Requiring Absolute Immunity

In his petition, Bougere raises the "issues" that the jury verdict was indeed supported by substantial evidence and that the protection of the public good does not require that absolute immunity apply in the instant case in an attempt

to persuade this Honorable Court to grant his petition for a writ of certiorari.

However, he does not support these assertions with even a single example of case law or any other authority. These bold assertions represent nothing more than Bougere's personal commentary. As such, they are essentially insusceptible of substantive argument. Consequently, Ferrara will not address these areas and simply rely upon the well reasoned decision of the Fifth Circuit Court of Appeals.

CONCLUSION

For these reasons, respondent, Carlo F. Ferrara, respectfully requests that this Honorable Court deny Bougere's petition for a writ of certiorari.

Respectfully submitted,

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